MISCELLANY.

Set-Off of Mental Anguish against Claim.—Quite a novel contention was raised in an action for damages alleged to have been suffered by the plaintiff in the nature of mental anguish, on account of her failure to attend the funeral of her son and view his remains, due to the neglect of a telegraph company to deliver promptly a message. Counsel for the company submitted special issues for the jury one of which was that if the jury find that the plaintiff would have attended the funeral, what amount in present cash would represent her damage, physical and mental; so that the amount so found could be deducted from any judgment they might render in favor of the plaintiff. The refusal of the court to submit the issue was assigned as error, but the judgment was: "Without comment, it is sufficient to say that, in our judgment, the assignment must be overruled." Western Union Tel. Co. *v.* McGaughey (Tex. Civ. App.), 198 S. W. 1085.

Maxims of Curbstone Law.—Curbstone law is that rule of conduct prescribed, practiced, and believed in by about nine tenths of the inhabitants of these states, writes Joseph L. Hooper in the April Case and Comment. It is the quintessence of the common-law the commonest common law. It rests purely on tradition; it has only the sanction of its votaries; but it is a legal system, as certainly as the Code Napoleon.

Perhaps loosely given opinions by real lawyers are the foundation of many of these maxims.

An interesting maxim of curbstone law, is this: "A woman's word goes further'n a man's in court." If a woman witness says a thing is so, and a man witness says it isn't, the woman must be believed. Not may be—must be. To us students of other systems who look on women witnesses as so many Sapphiras this seems passing strange; but to the curbstone lawyer it is gospel.

If a man owes you a bill and you dun him for it on Sunday, that cancels the bill. This is equally true if you dun him over the telephone. If a landlord serves his tenant a notice to quit, the tenant need pay no more rent, even if he stays on for a month. The notice absolves him. A prosecuting attorney must advise everybody and try everyone's case for nothing, whether the matter is civil or criminal. If you want to collect a bill, and don't care to hire a lawyer, the prosecutor must "take it up on behalf of the people." If your lawyer fails to win your case, you may, with cheerful impunity, fail to pay him for his services. There are, however, *contra* views as to this last rule.

You must bequeath at least a dollar to each of your children or your last will and testament is void. Many a would-be will breaker

huskily breathes this maxim into your patient ear. It is useless to argue with him, and more useless with her, for this is one point on which curbstone authority is adamant.

Windowpane Law.—Under the provisions of curbstone law, a witness may not testify to acts seen through a pane of glass. In other words, if you are sitting in a hotel window and see a murder committed in the street, you may not, as a witness, give your version of the crime. When I was a prosecuting attorney, I asked a policeman what he was going to testify as to an affray he witnessed near the jail. "Nothing. I can't testify. I seen it through glass," was his rejoinder.

My theory of this branch of curbstone law is, that in remote times, soon after glass windows had come into use, a witness (the sole eyewitness, perhaps), testified that he saw through the window the defendant killing his victim. The jury refused to believe him and acquitted the defendant which is precedent enough for the disciple of curbstone law. From this humble beginning arose the vast body of windowpane law which forms so important a part of the parent system.

Immunity by Reason of Eyeglasses.—Curbstone law forbids one man to strike another who is wearing eyeglasses. To hit a man wearing glasses is a felony, punishable by imprisonment for a long term of years. At least a hundred times in my practice I have heard this unwritten law expounded. No matter what the provocation, no matter if he of the eyeglasses is the aggressor, curbstone law steps in and says in thunder tones: "You dare not swat him! Let him alone, or state's prison stares you in the face!"

This immunity has saved many a man from punishment, whether merited or not. I have known of only one instance where this law was circumvented. A man and his wife had an altercation with an eyeglass-bearing boarder, who broadly insulted the lady. Her husband was about to beat the boarder upon the head, when his spouse interposed, saying, "Don't hit him! He wears glasses!" Whereupon her husband plucked the legal talisman from the boarder's nose, laid it carefully on a bureau, and smote his unglassed opponent, nose, hip, and thigh.

Refusal of Extradition.—Considerable interest has been aroused by the almost unprecedented action of Governor McCall of Massachusetts in refusing a request of the Governor of West Virginia for the extradition of a fugitive from justice, who was charged with crime in the latter state.

The accused is a negro and the crime charged was an assault on a young white girl. Governor McCall is reported to have declined to grant the requisition because of a report by the Assistant Attorney General of Massachusetts, who conducted a public hearing, that

there was "danger that Johnson (the fugitive) might be convicted of a crime of which he may not have been guilty."

There can be no doubt whatever that in refusing to honor the requisition Governor McCall flagrantly violated his duty as Governor of Massachusetts. See McNichols *v.* Pease, 207 U. S. 100, where it is said:

"When the Executive authority of the State whose laws have been thus violated makes such a demand upon the Executive of the State in which the alleged fugitive is found as is indicated by the above section (5278) of the Revised Statutes—producing at the time of such demand a copy of the indictment, or an affidavit certified as authentic and made before a magistrate charging the person demanded with a crime against the laws of the demanding State—it becomes, under the Constitution and laws of the United States, the duty of the Executive of the State where the fugitive is found to cause him to be arrested, surrendered and delivered to the appointed agent of the demanding State, to be taken to that State." (207 U. S. 108.)

Nor is this violation of duty in any way mitigated by the fact that the Governor appears to have concerned himself with the matter of race prejudice. This question was considered by the Supreme Court of the United States in Marbles *v.* Creecy, 215 U. S. 63. In this case Marbles had been indicted in Mississippi, and on the requisition of the Governor of that state was arrested in Missouri. On an application for a writ of habeas corpus the fugitive set up the following contention:

"Your petitioner further states that he is a negro, and that the race feeling and race prejudice is so bitter in the State of Mississippi against negroes that he is in danger, if removed to that State, of assassination and of being killed, and that he cannot have a fair and impartial trial in any of the courts of that State, and that to deliver him over to the authorities of that State is to deprive him, as a citizen of the United States and a citizen and resident of the State of Mississippi, of the equal protection of the laws." (215 U. S. 69).

The court, however, held that such a matter as this was not proper for consideration, the presumption being that the accused would receive exact justice in the state where he was charged with crime, saying:

"It is clear that the executive authority of a State in which an alleged fugitive may be found, and for whose arrest a demand is made in conformity with the Constitution and laws of the United States, need not be controlled in the discharge of his duty by considerations of race or color, nor by a mere suggestion—certainly not one unsupported by proof, as was the case here—that the alleged fugitive will not be fairly and justly dealt with in the State to which it is sought to remove him nor be adequately protected, while in the

custody of such State, against the action of lawless and bad men. The court that heard the application for discharge on writ of habeas corpus was entitled to assume, as no doubt the Governor of Missouri assumed, that the State demanding the arrest and delivery of the accused had no other object in view than to enforce its laws, and that it would, by its constituted tribunals, officers and representatives, see to it not only that he was legally tried, without any reference to his race, but would be adequately protected while in the State's custody against the illegal action of those who might interfere to prevent the regular and orderly administration of justice." (215 U. S. 69, 70.)

It seems clear, however, that while Governor McCall has flagrantly violated his moral duty there is no remedy; that is to say, he cannot be compelled to perform his duty in this respect. This is the rule announced by the Supreme Court of the United States, in the leading case of Kentucky *v.* Dennison, 24 How. 66. In that case the Governor of Ohio had refused to honor a request for the extradition of a fugitive from the State of Kentucky, basing his refusal on the ground that the offense charged against the fugitive was not one as to which the constitutional provision for extradition was intended to operate. A motion was made on behalf of the State of Kentucky for a mandamus compelling the Governor of Ohio to honor the requisition. But the court held that while the action of the Governor of Ohio was a grave and reprehensible violation of his official duty, the duty was nevertheless, merely a moral one, and that the federal government was powerless to coerce him to perform it. The court said:

"When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the State, and not by the Executive authority of the State of Ohio.

"The demand being thus made, the act of Congress declares, that 'it shall be the duty of the executive authority of the state' to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words, 'it shall be the duty,' in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject matter of this law, and the relations which the United States and the several States bear to each other, the court is of the opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declara-

tory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. * * *

"It [the act of 1793] does not purport to give authority to the Executive to arrest and deliver the fugitive, but requires it to be done, and the language of the State law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the Governor, it evidently points to the duty imposed by the Constitution, in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

"And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'it shall be his duty.'

"But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him." (24 How. 107, 109-110.)

The result of this case is that it is firmly established as a part of the law of our land that a criminal is safe if he can escape from the state where his crime was committed into another state whose Governor is insensible of his moral obligations under the Federal Constitution, at least for so long as the recalcitrant governor remains in office.

In view of this unfortunate state of the law, and of the lack of power in the federal government to afford a remedy, it would seem most desirable that the several states should enact appropriate legislation to guard against such violations of duty by executives in the future.—Bench and Bar.

Calling Hostile Witness.—The opinion of the United States District Court, in Nulomoline Co. *v.* Stromeyer, 245 Fed. 195, contains sound and helpful remarks as to a practical situation of which technical advantage is often sought to be taken. The substance of the actual decision was that the defendant would not be enjoined from selling sugar made by him and from generally selling to persons in the trade because a former employee of plaintiff had disclosed its

process of sugar making to defendant and sent defendant the names of customers of plaintiff and as a broker sold defendant's sugar to former customers of plaintiff, as there was nothing outside the fact of disclosure of information to show that defendant had sought the same or had made unjustifiable use of it. The plaintiff was in the position of having to call its discharged employee as a witness, and the court had this to say:

"The difficulty which confronted the very capable counsel for plaintiff in their efforts to develop the facts as they wished them to be found was this: They had within their reach very little, if any, evidence of the doing of the acts by the defendant of which their clients complained, other than the disclosures above mentioned to have been made by the employee. It was an easy matter for them to prove that the employee had made admissions which inculpated the defendant. They were not to be criticised for anticipating that the employee, if called as a witness and interrogated directly as to the facts, might not testify in line with his former statements, but might qualify or explain them away. The burden was upon the plaintiff to establish the facts by affirmative evidence, and counsel were in consequence under the necessity of calling the employee as their own witness. The wisdom of the trial strategy of avoiding the direct inquiry, but asking first whether the employee had not made the admissions embodying the facts sought to be proved, and then inquiring whether the statements were not true, was, of course, obvious. Ordinarily, such a method of conducting the examination of a witness would not be tolerated. Inasmuch, however, as the complaint against the defendant necessarily involved the charge of a conspiracy between him and the witness, counsel for plaintiff were permitted, after first laying ground for such a course of examination, by showing the interests of the witness to be adverse to those of the plaintiff and his attitude to be one of hostility, to ask questions in a form which would otherwise have been objectionable as leading. The door was opened to them to the full width, and they were given the widest latitude in this respect. The required accompaniment of such a ruling, however, is that the trier of facts to be found from such testimony should exercise the closest scrutiny to distinguish between proof of the fact that the witness had made such prior statements and his sworn testimony in the present trial of what the real facts were."

As already shown, notwithstanding the evidence so elicited from the employee, the court dismissed the bill, holding that plaintiff had not made out a case either of unfair competition or unauthorized disclosure of trade secrets. The judicial attitude displayed on this branch of the case is, however, worthy of note, because not infrequently when a party calls a witness who is actually hostile, opposite counsel insist that the ordinary rules as to an ordinary witness shall be strictly

observed. Under such circumstances it is just and proper to admit leading questions, and in other respects to rule as if the inquiry were cross instead of nominally direct examination.

Denial of Due Process of Law.—In Saunders *v.* Shaw, in the Supreme Court of the United States, 244 U. S. 317, 37 S. Ct. 638, the court rendered a decision the substance of which is stated as follows in the syllabus:

"It is a violation of due process of law for a State Supreme Court to reverse a case and render judgment absolute against the party who succeeded in the trial court upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had therefore no occasion and no proper opportunity to introduce his evidence.

In a suit to enjoin the collection of a drainage tax, evidence offered by the plaintiff to prove that his land could not be benefited by the drainage improvement was ruled to be inadmissible upon defendant's objection, but was spread upon the record as carried to the State Supreme Court upon appeal from the judgment in defendant's favor. The latter court, after affirming the judgment, reversed it on rehearing and granted a permanent injunction against the tax upon finding from the answer and testimony before it that the land had not been and could not be benefited, and declined to consider defendant's application for further rehearing. Held that in thus rendering judgment against the defendant without affording opportunity to introduce evidence upon the question of benefit there was a violation of due process of law, contrary to the Fourteenth Amendment.

Upon the sustaining of his objection to evidence upon the ground that the point to which it is directed is immaterial, a party is under no obligation to offer evidence to rebut that which was offered by his opponent and ruled to be inadmissible.

A claim that a judgment of a State Supreme Court violates rights under the Fourteenth Amendment is not too late, though first made by the assignment of errors presented to its chief justice when the writ of error from this court was granted, if the aggrieved party was under no duty to anticipate the State court's action before the judgment was rendered and was afforded no opportunity afterwards to present the claim for its consideration."

In Jones *v.* Buffalo Creek Coal & Coke Co., in the Supreme Court of the United States (December, 1918, 38 Sup. Ct. R. 120), it was laid down that the error of a trial judge in admitting evidence or entering judgment after a full hearing does not constitute a denial of due process of law within the meaning of the Fifth (the appeal was from a Federal court having jurisdiction through diversity of citizenship) or Fourteenth Amendments to the Federal Constitution.

Accordingly it was held that in an action for ejectment, where plaintiff set up title from the State through mesne conveyances by virtue of sales made for the benefit of the school fund under valid statutes, and thereupon recovered, defendant was not deprived of property without due process, justifying review in United States Supreme Court upon direct writ of error to United States District Court. The court in a unanimous opinion by Mr. Justice Brandeis said in part:

"It was the contention of the plaintiff below that the records and papers in the three suits established title in those under whom it claims, and also that the decrees in those suits created res judicata as against the defendant because their predecessors in title had been parties or privies to those suits. The defendants below contended, among other things, that the premises in question were not within the tracts affected by one or more of the decrees in those suits and that they were not bound by any of them. It is conceivable that the defendants below were right in whole or in part, and that the trial judge erred in admitting some or all of the evidence objected to and in rendering judgment for the plaintiff. But error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law (Central Land Co. *v.* Laidley, 159 U. S. 103, 112, 16 Sup. Ct. 80, 40 L. Ed. 91."

In an editorial comment the New York Law Journal says: These two recent decisions of the Supreme Court taken together give a fresh illustration of its attitude toward the question of denial of due process of law. If a party claiming to be aggrieved was, after adequate notice of the time and place, accorded a full and fair hearing, with opportunity to present his evidence, it will not be held that due process of law was denied because of alleged legal error on the part of the trial tribunal. The result will be otherwise if in the opinion of the Supreme Court there has been disregard of obvious safeguards and essential tests for the determination of substantial rights. There are conflicting dicta and perhaps minor inconsistencies of doctrine in the various decisions of the Supreme Court on the subject. It has indeed been contended with some plausibility that according to its own utterances the Supreme Court "should review all cases in which State courts are in error concerning their own law." It is believed, however, that the inconsistencies are superficial and that the decisions are reconcilable because from different points of view and under varying statements of fact they lay down the broad policy of practical justice above indicated.